SUPREME COURT, U. S.
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No. 73-675

In the Supreme Court of the United States

OCTOBER TERM, 1973

JAMES A. RUTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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Petitioner contends that the trial court's instructions constituted reversible error under this Court's decision in *United States* v. *Enmons*, 410 U.S. 396.

Following a jury trial in the United States District Court for the Western District of Pennsylvania, which took place before this Court's decision in *Enmons*, petitioner was convicted of extortion in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to one year's probation and fined $300.

The court of appeals, after the decision in *Enmons*, affirmed (Pet. App. 10-11).

1. The indictment, which charged petitioner and two others with Hobbs Act violations, contained five counts: the first count charged a conspiracy, and the remaining four counts charged substantive violations.[1] Petitioner was convicted on count four, which charged in pertinent part:

> [T]hat on or about May 1, 1971, at the site of the Pennzoil Refinery Construction project, . . . JAMES A. RUTH, the defendant herein, did knowingly, willfully and unlawfully obstruct, delay and affect and attempt to obstruct, delay and affect commerce . . . by extortion, as that term is defined in and by Section 1951 of Title 18, United States Code; that is to say, the defendant did obtain property in the form of wages for *imposed, unwanted, superfluous* and *fictitious* services by Ironworkers of Local 348, in connection with the furnace work and fireproofing at the construction project, from Buddy L. Raymond, an agent and representative of Refractory Construction Corporation with his consent induced by the wrongful use of actual and threatened force, violence, and fear, in that the defendant did threaten force and violence against the person of Buddy L. Raymond, by firing six (6) bullets into his, Raymond's desk, unless and until the Refractory Construction Corporation paid said wages. [Emphasis supplied.]

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[1] Co-defendants Knapp and Carr were acquitted on all counts.

As we show within, the indictment thus charged an offense, and petitioner was convicted of an offense punishable under the Hobbs Act as interpreted in *Enmons*.

2. In 1970, Refractory Construction, Inc. (RCI) a Tulsa, Oklahoma building contractor, entered into an agreement with a primary contractor, Foster Wheeler, Inc., to perform certain fireproofing work at a refinery in Rouseville, Pennsylvania (Ray. 2-4).[2] Work began in September or October and was suspended in mid-December because of the cold weather (Ray. 5-9). During this period, RCI had completed 60% of the fireproofing work required by its contract and 65% of its structural steel work (Ray. 9). No more than four ironworkers had been employed at any time up to the suspension of operations (Ray. 9-10).

In March 1971, RCI resumed its operations at the refinery job. The company sent David Myers to supervise the work. In April, Myers telephoned Buddy Raymond, the company's general field superintendent, expressing fear in regard to his position as job superintendent. Two days later, Myers reported to Raymond that he intended to leave the job. Raymond persuaded Myers to stay until he arrived at the job site (Ray. 10-12).

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[2] We are lodging with the Clerk relevant portions of the trial transcript: three separately paginated volumes consist of transcripts of the testimony of Buddy L. Raymond ("Ray.") and petitioner ("Ruth") and the court's closing instructions ("T").

The following Sunday, Raymond met with Myers at a motel near Rouseville. Myers told him that he had been threatened by petitioner and co-defendant Daniel Carr, who were members of the ironworker's local union (Ray. 12-13); he said that threats had been made of physical harm and property damage by dynamiting (Ray. 14). Examining the payroll records, Raymond noticed that seven ironworkers, including a "general foreman" (Carr) and a crew foreman (petitioner) (Ray. 23), had been employed, although that many ironworkers were not needed. Myers explained that Knapp, the business agent of the Union, had required the surplus hirings (Ray. 14, 24). Finally, Myers told Raymond that the ironworkers had demanded a letter authorizing them to do all of the scaffolding work. He cautioned Raymond to beware because petitioner and Carr had threatened "to cave your face in when you walked through the door" (Ray. 14-15).

The next morning, at the company's office trailer, Raymond introduced himself to Carr and asked what the trouble was all about. Carr declined to discuss the matter and left (Ray. 16-17). Less than an hour later all of the ironworkers entered the office trailer, and Carr asked Raymond what he had meant when referring to "trouble" (Ray. 18). Raymond replied that Myers had reported to the general office in Tulsa that he was having problems on the job. Carr stated that they should have beaten Myers (Ray. 19). He also said to petitioner, referring to Raymond, that "we will just cave his face in to break him in right"

(Ray. 18). In this tense atmosphere, another ironworker demanded written authorization for ironworkers to do the scaffolding work. Despite the fact that ironworkers generally were not entitled to the scaffolding work, and 90% of the scaffolding had already been completed, Raymond, acting out of fear, prepared a letter giving the ironworkers exclusive right to perform all labor associated with the scaffolding (Ray. 20-23).

On the next day one of the surplus ironworkers quit. Over Raymond's objection, he was required to hire a replacement sent by the business agent (Ray. 24-25). Notwithstanding the surplus of ironworkers, the job they were expected to perform was not being done on schedule, causing a backup of other operations that could not begin until the structural steel work had been completed (Ray. 25). In particular, Carr and petitioner, although drawing full pay, did no work at all (Ray. 101-102).

On Friday, April 19, Raymond was seated behind a desk in the office trailer when petitioner entered the trailer in an angry mood. Declaring that "Nobody here is going to mess with the ironworkers * * *" (Ray. 30), petitioner removed a revolver from his pocket and fired six shots into the desk (Ray. 30, Gov't. Exh. 4). He reloaded the gun, fired once, experienced a misfire, and then prepared to leave as Carr entered the trailer. Petitioner complained to Carr that the gun was unreliable (Ray. 30-31). Petitioner displayed a permit for a gun and said to Raymond, "See, I can kill you if I want to."

Petitioner also told Raymond, "I could get nine ironworkers in here as witnesses that you pulled a knife on me" (Ray. 36).

As a result of continuing intimidation and delays (Ray. 37), RCI elected not to complete its contractual obligation and closed its operation. Another firm completed the work (Ray. 109). Under normal working conditions, RCI would have employed from two to four ironworkers, who would have performed the amount of work remaining to be done after the resumption of work in less than ten days at a cost of no more than $2,500. Instead, because of the fear instilled in the RCI superintendents, RCI had hired as many as eight ironworkers and had a net payroll charge of $20,000 attributed to the ironworkers (Ray. 45-52). The incident involving petitioner's firing of his weapon into Raymond's desk formed the basis for the charge upon which he was convicted.

3. Testifying in his own behalf, petitioner denied ever threatening Myers or Raymond and stated that he had been sent to the RCI site by Knapp, the Union's business agent, in response to a request by RCI for manpower. According to petitioner, after Knapp had examined the amount of work to be done, he informed Myers that more help was needed and sent petitioner to serve in the capacity of foremen of one of two ironworkers' crews (Ruth 4-7). Petitioner denied being present at the Monday morning episode when the scaffolding authorization letter was prepared (Ruth 17). His version of the revolver

incident was that, having heard that Raymond was interested in purchasing a gun, petitioner offered to sell him one for five dollars. Raymond sought assurances that it would work and invited petitioner to fire shots into his desk, indicating that the desk was old and could not be harmed much more. After petitioner fired the weapon successfully four times, Raymond made the purchase; however, a few days later petitioner was compelled to renege on the deal, retrieve the gun, and return it to his supplier because he learned that the weapon was stolen (Ruth 19-21).

4. The evidence established that petitioner used force and violence to compel RCI to pay for unneeded and superfluous services.[3] Accordingly, the conduct charged as criminal falls within the proscription of the Hobbs Act. See *United States* v. *Green*, 350 U.S. 415; *United States* v. *Enmons*, *supra*, 410 U.S. at 408. The sole question presented in this petition is whether the trial court's pre-*Enmons* instructions so far departed from the *Enmons* rationale as to permit the jury to convict petitioner if the use of force was employed only to achieve legitimate labor ends.

The instructions petitioner complains of are that " 'it is not proper to obtain a labor objective by force, violence, or fear' " and that " 'there is nothing in Hobbs that protects unions or union people acting under the guise or the apparent pretense of a union contract in attempts to get personal property through

[3] Although at trial petitioner defended on the ground that he made no threat at all, that claim is not raised in the petition.

threats of force or violence' " (Pet. 5). In the circumstances of this case, such instructions did not constitute reversible error. The second instruction is correct in that it points out that a pretense or guise of a legitimate end, as opposed to a valid labor objective, does not exclude punishment under the Hobbs Act. The first instruction, while not anticipating *Enmons*, could not have led the jury into error, since the indictment, which was both explained to the jury and sent with the jury to the jury room (T. 9), clearly alleged extortion of "wages * * * for *imposed, unwanted, superfluous and fictitious services*" (emphasis added; T. 21). Several times during its instruction the court also referred to violence to obtain "wages which are not rightfully due" (T. 14, 27-28). The Court has recently reaffirmed the settled proposition "that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge," *Cupp* v. *Naughten*, C.A. 9, No. 72-1148, decided December 4, 1973, slip op. 6.[4] We submit that under the facts of this case the jury was adequately instructed and found the facts alleged in the indictment to have been proved.

Unlike the situations in *United States* v. *Caldes*, 457 F. 2d 74 (C.A. 9), and in *Enmons*, *supra*, relied upon by petitioners, the evidence in this case contains no indication that petitioner or his labor union

[4] The trial court here repeated this admonition, stressing that the jury should not "single out one instruction alone as stating the law, but consider all of the instructions together and as a whole" (T. 2).

was pursuing any lawful labor objective when he fired the pistol at Raymond's desk, or that this incident was otherwise related to a course of conduct directed at achieving a legitimate benefit for the local union. Indeed, petitioner's brief makes no reference to any lawful labor objective that might have prompted the shooting by petitioner, and petitioner's own explanation at trial for this conduct was wholly unrelated to labor matters.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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